

EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

— — — — —
ePLUS, INC.,
Plaintiff,
v.
LAWSON SOFTWARE, INC.,
Defendant.
— — — — —
: Civil Action
: No. 3:09CV620
: January 22, 2010

COMPLETE TRANSCRIPT OF **MARKMAN HEARING**
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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UNITED STATES DISTRICT COURT

1 into the new database they are going to use.

2 Is that a vendor catalog? It's got catalog
3 data. Why does it have to be from a vendor,
4 particularly when the patent points out it can be from
5 so many different sources such as distributors and
6 manufacturers?

7 So I think that would be proper to import
8 that term.

9 THE COURT: You agree with his definition
10 now, don't you, after you have read the briefs?

11 MR. McDONALD: No, Your Honor.

12 THE COURT: Why not? I mean, really and
13 truly, there's no basis for the limitation of a vendor
14 that I can find because they do -- I think it's time
15 for you all to sort of really come to reason and
16 rationality. They talk about all kinds of third
17 parties, manufacturers, suppliers, distributors. Some
18 of whom sell. Some vend. Some of whom don't. And it
19 doesn't appear in the claim language. So why do we
20 have to bring that in or why do we have to spend any
21 more time arguing other than you saying something like
22 this: You know, after having read their briefs, I
23 think we can live with that. How about that?

24 MR. McDONALD: The patent itself, Your Honor,
25 does talk about vendors and that is the --

1 THE COURT: It talks about vendors, but it
2 doesn't limit it to vendors and you're trying to limit
3 it.

4 MR. McDONALD: But when the invention itself,
5 though, is so focused on this concept of the new thing
6 using this catalog database with this large volume of
7 information --

8 THE COURT: See, that's what I'm saying. You
9 shouldn't be making arguments like that. That's what
10 I'm saying. You're arguing about how many angels can
11 stand on the head of a pin. And there's no real merit
12 to it. And it's the kind of thing that obscures the
13 ability of courts to efficiently process patent cases.

14 I really think in making your arguments, both
15 of you need to be facing the fact that -- face this
16 fact: That if, in fact, I make a claim determination,
17 and I later find that what it is is a sneaky way to get
18 a summary judgment in, I may reconstrue the claim in
19 the summary judgment process because I'm not going
20 to -- this is one of the reasons why often I find that
21 it's important to have the claim construction and the
22 summary judgment proceed apace, and I may in fact just
23 do that in this case. Holding everything until I see
24 your summary judgment motions. But I really think that
25 there has come to be this approach to claim

1 construction that it is a "gotcha" for summary judgment
2 instead of being what it was intended to be. And what
3 it was intended to be is where there really are genuine
4 ambiguities in a patent, let's get a construction and
5 live with it.

6 And sometimes that's going to result in
7 summary judgment and sometimes it's not. And now claim
8 construction is becoming a way to try to structure and
9 rewrite claims in such a way as to get a summary
10 judgment. And I want you to stop it. Okay.

11 MR. ROBERTSON: Just for record, I was
12 referencing the '683 Patent at column 4, lines 46 to
13 60, where all those different supplier, manufacturer or
14 vendor catalogs are described. Of course, Fisher
15 Scientific was --

16 THE COURT: Where is it?

17 MR. ROBERTSON: Do you have that column?

18 THE COURT: '683?

19 MR. ROBERTSON: Column 4, 46 to 60, for
20 example. There are other examples that we gave in the
21 brief. But here you are, Judge, we're talking about
22 distributor catalogs, suppliers, manufacturers, other
23 distributors listing vendor products.

24 With that I'd like to move on from "catalog"
25 unless you have any other questions with respect to

1 is a means-plus-function claim if instead of module
2 those two have the word "means" in them.

3 So we didn't go there. It would not be
4 appropriate under the law for us to contend that those
5 first two modules were means-plus-function, but it was
6 appropriate for the third one because there's just no
7 structure in there. There's nothing like a data field
8 or collection of catalogs.

9 THE COURT: All right.

10 MR. McDONALD: Can we go to slide 494,
11 please.

12 This has to do with the catalog issue, Your
13 Honor. I'm going through the terms that are not
14 means-plus-function terms, obviously. And I think that
15 the core point that we're trying to emphasize here is
16 the case law makes it pretty clear that when you're
17 construing a term, sure, it's not limited necessarily
18 to the preferred embodiment, but you do have to read it
19 in view of the specification. And there are ways that
20 an applicant will narrow the scope of a term or at
21 least give it some specificity through how they use it.
22 And we believe our definition is very consistent with
23 how various collections of item information are used in
24 the patents.

25 THE COURT: If you do what you're talking

1 about, aren't you in this instance importing a
2 limitation from a specification into the claim?

3 MR. McDONALD: No, Your Honor. I think going
4 to the next slide here, we have a quote from a couple
5 of Federal Circuit cases. The term shouldn't be
6 limited just because they are used in the specification
7 to describe a preferred embodiment.

8 But nevertheless, the context may narrow a
9 term that out of context may be broader. You don't
10 have to have expressly defined it as a lexicographer as
11 the applicant in order to have used the term in a way
12 that will narrow it.

13 And here we talk about, obviously, the
14 features of our definition of catalog that are at issue
15 really are two things. One is we're saying they come
16 from vendors. And that term we do not mean to be
17 unduly narrow, and I'll show why in the specification
18 itself it uses vendors really to apply to all these
19 categories of sources for catalogs. It applies to the
20 distributors. It applies to vendors. It applies to
21 other suppliers. All those are called vendors.

22 So that's a term that we were not meaning to
23 be unduly narrow, but it is in general the folks that
24 are selling your products.

25 THE COURT: If it includes manufacturers,

1 distributors and suppliers, why is your definition any
2 different from theirs?

3 MR. McDONALD: Theirs would include things
4 like a shopping list or --

5 THE COURT: Like a what?

6 MR. McDONALD: A shopping list. I'm going to
7 go to the store. That's an organized --

8 THE COURT: You mean a shopping list such as
9 my wife writes up when I go to Ukrop's?

10 MR. McDONALD: Yeah. It would include a
11 requisition. It would include a purchase order.
12 That's an organized collection of items and associated
13 information. Typically it includes a part number and
14 -- when you go to the grocery store, you probably
15 wouldn't have a part number on that one. But
16 requisitions -- you're placing a requisition. I'm not
17 selling anything. I'm not putting out a catalog, but I
18 am placing an order for something or going down and
19 asking the boss to approve a requisition list. I want
20 six rolls of Scotch tape. I want 12 pens. I want 15
21 notebooks. And this is the size I want. And maybe
22 I've even got a part number or a catalog number on
23 there because I looked it up. And I need somebody's
24 approval.

25 That would meet their definition of a

1 catalog. And that's our concern as to what's going on
2 here. And I'll put the issue on the table. We do have
3 a situation here, I think Mr. Robertson alluded to it,
4 but our client Lawson has been in business since the
5 '70s selling various business systems including
6 purchasing types of systems.

7 They have had something since long before
8 even that RIMS patent was filled going back to at least
9 to the '80s called an Item Master that their customers
10 would populate. They don't sell it with it. They sell
11 it basically as a blank book. But the customer gets
12 it. The customer can populate it with the stuff they
13 buy. So they put in the list of things. Not everybody
14 wants a catalog of Fisher Scientific's 100,000
15 products, Promega's 50,000 products or McKesson's
16 150,000 products for all their employees to be
17 reviewing while they are deciding what they want to
18 buy.

19 There are certain customers that need that
20 and this invention maybe is good for those folks, but
21 there's a whole lot of other folks out there. Maybe
22 they are smaller businesses. Maybe they --

23 THE COURT: Well, is it accused? Is that
24 part of what you are describing? Is that accused?

25 MR. McDONALD: Yes. They are saying that our

1 Item Master that our customer is using will populate
2 with products of their own choosing that they choose to
3 have their employees have access to, that's multiple
4 catalogs. That's what they are contending.

5 THE COURT: Is that patented?

6 MR. McDONALD: No. A lot of folks don't
7 patent software. That's why there is a lot of crazy
8 software patents out there that go back to the '80s and
9 '90s because a lot of folks back then didn't even know
10 you could patent software.

11 The Federal Circuit didn't really shoot that
12 across the bow with clarity until that State Street
13 Bank decision came out, which was not out back in the
14 '80s and '70s and early '90s. I think it was about ten
15 years ago when that one came out.

16 So a lot of companies like Lawson were coming
17 up with products. Maybe they didn't think it was more
18 than an obvious improvement. Maybe they didn't realize
19 it was patentable. I think it was a combination of
20 both. That's why there have been a lot of software
21 cases. This is one of the worst areas of patent law.

22 THE COURT: Boy, you got that right.

23 MR. McDONALD: It's because some people were
24 playing by the patent game and some folks weren't. So
25 the Patent Office, you know, I guess, could they have

1 done a better job? Sure. But at some level they were
2 handcuffed there because they didn't have the prior art
3 with people filing it as much as they could have and
4 should have been to give that base of data available
5 where they could have said, Oops, here's somebody else
6 who's already filed for this one. That's old. That's
7 been around since the '70s.

8 THE COURT: Does the prior art have to be a
9 prior patent?

10 MR. McDONALD: No, it could be a printed
11 publication, things like that.

12 THE COURT: Was your thing in a printed
13 publication?

14 MR. McDONALD: Yes. We got our version of
15 the product offered for sales really would be the way
16 it would qualify.

17 THE COURT: So if they assert that this is
18 accused and use their definition, if they accuse your
19 system there -- what do you call it?

20 MR. McDONALD: Our system, it's -- they have
21 the S3 and the M3.

22 THE COURT: You gave it another name a minute
23 ago.

24 MR. McDONALD: The Item Master.

25 THE COURT: The Item Master. You do the Item

1 Master. They say that the Item Master infringes. Your
2 defense to that is not a definitional situation. It is
3 that you previously published about that before they
4 got their patent. It was in the prior art and
5 therefore the patent is invalid as to that Item Master,
6 right?

7 MR. McDONALD: Right. Well, the issue there,
8 though, that doesn't answer the whole question because
9 we're really only talking about an element of a claim.
10 So now you have all these other issues of -- well, they
11 also have this purchase order generation module and so
12 on. We have to walk through those.

13 But on this issue, if "catalog" was really
14 that broad, we would say, Well, yeah, we did have
15 something like that before. But they could still say,
16 Well, maybe you didn't do that one before, but now we
17 have you over here or over there.

18 Part of my point, though, isn't just that
19 Lawson was doing it, but in fact things like an Item
20 Master were out there even in the RIM system that they
21 admit in these patents were prior art.

22 THE COURT: So they lose under the prior art
23 doctrine but not because of a claim construction.

24 MR. McDONALD: Well, that depends on what the
25 patent says about that and whether it's really saying

1 we've got something different here from the RIMS item
2 or organization of items and things like that or
3 whether a catalog is just one of those things that they
4 describe and disclose as --

5 THE COURT: No, that's just one way you can
6 win. That's just one way you get up on that issue.
7 It's where do you win it. Do you win it here or do you
8 win it in the validity fight because your product and
9 idea was in the prior art.

10 What I'm getting at is this: There isn't any
11 point in trying to squeeze or twist language in claim
12 construction for the mere purpose of dealing with what
13 can be dealt with in the validity part of the case.

14 MR. McDONALD: Well, the claims mean what
15 they mean at some level. You can only move that needle
16 so much. I appreciate that. But, I mean, the fact is
17 it's a lot harder for somebody in our shoes to prove
18 invalidity. The patent is presumed valid.

19 Obviously, it's being pursued at the Patent
20 Office, at least so far, with the preliminary decisions
21 that have been made so far with uniform success.

22 THE COURT: But if it's undisputed that your
23 system was in the prior art, you win that. That's a
24 matter of summary judgment, don't you?

25 MR. McDONALD: Well, there's other issues.

1 The product has evolved over the years. So some of
2 these other features come into play. So that's where
3 there's going to be other issues. That in itself
4 doesn't mean I win. That helps. It could help on
5 that. And certainly we have got other prior art other
6 than our own that may well be summary judgment.

7 So I understand that. It's not necessarily
8 to our benefit for everything to be narrow, narrow,
9 narrow. It may not be, but I do believe that one of
10 ordinary skill reading this patent, reading this series
11 of patents, would not believe a catalog is just any
12 organized collection of items with descriptions of
13 information about them because there's so many other
14 things in these patents that would meet that
15 description like a requisition, like a purchase order,
16 like the cross-reference tables that we were talking
17 about before, like what's in the RIMS patent, the parts
18 masters table.

19 There are so many lists of item information,
20 organized lists, that are not in catalogs. In fact, in
21 some cases they are specifically called non-catalog
22 that I think it is certainly the case that one of
23 ordinary skill reading this thing would have to find a
24 way to construe the term "catalog" to be consistent
25 with what is a catalog and what is not a catalog in

1 these patents.

2 So just to give an example of that right
3 here. This is slide No. 99. What's not a catalog, I
4 think, sheds a lot of light on what is a catalog in the
5 specifications. We've got some language even out of
6 one of the claims of this patent. It's claim 17 of the
7 '516 Patent.

8 It said "converting" means -- includes a
9 non-catalog database containing a cross-reference
10 table. You have already been hearing about the
11 cross-reference table. I also have on this slide Table
12 5 because that refers to non-catalog information. I
13 think that's what they are talking about here as part
14 of this non-catalog database.

15 But what it's got is it's got things like
16 quantity, price, vendor, catalog, description. It's an
17 organized database list of information about items.
18 They told the public when this patent came out that
19 that's not a catalog. That is a non-catalog database.

20 So it would be in conflict with their own
21 message they gave to the public to define the term
22 "catalog" as broadly as ePlus proposes here. That's
23 our point. Here's an example.

24 THE COURT: You would be willing to define
25 "vendor" as a supplier, a manufacturer or distributor

1 or any other person who offers products whether his or
2 his own for sale, is that --

3 MR. McDONALD: That is absolutely true, Your
4 Honor. I've got up here on the screen 97 or slide
5 No. 97, which is column 4, lines 46 to 60 of the '683
6 Patent. I believe ePlus put this up before as well.
7 What I've highlighted here is really --

8 THE COURT: They don't call it just a
9 distributor or a supplier or a manufacturer. They call
10 it a vendor distributor, a vendor manufacturer.

11 MR. McDONALD: Outside suppliers --

12 THE COURT: Then they say "outside
13 suppliers," whether other manufacturers or
14 distributors, listing such vendor's products.

15 MR. McDONALD: Right. So my point here is,
16 Your Honor, I did not intend for the term "vendors" to
17 be limited. I thought the patent would also tell the
18 world that a vendor could include just about anybody
19 who sells something, but not folks who are buying
20 stuff. That's the fundamental difference between our
21 products here that they are trying to evade by having
22 this definition of catalog include lists of stuff
23 people buy. Our client's focus is on the customer who
24 is buying stuff. They are the folks buying our
25 software.

1 Fisher Scientific's focus was, We've got
2 100,000 things we're selling in this catalog. The more
3 we can sell, the better. So let's get a system out
4 there that sells as much stuff in our catalogs as we
5 possibly can. This is an important distinction. And
6 it reverberates throughout all the claims of this case.

7 THE COURT: But your concern is to exclude
8 lists of things that people have decided to buy.

9 MR. McDONALD: Lists of things that --

10 THE COURT: Or listed that they are going to
11 buy.

12 MR. McDONALD: Yes.

13 THE COURT: And he's not trying to included
14 those, is he?

15 MR. McDONALD: Well, I think his definition
16 is. I think he's got to, I think, to include our
17 customers' products.

18 Let me pause for a moment, Your Honor, and
19 give you at least a little "heads-up" on an issue here
20 that you're probably not going to particularly like,
21 but I'll at least give you the context of it.

22 It has to do with these catalogs. Remember,
23 I was saying before that Lawson when we sell our
24 products they're empty. We've got the software, but
25 they don't have the items populated in them. The

1 customers do that themselves.

2 I think there was maybe some testimony that
3 if somebody asked, we might do it for them. But why
4 would they ask? We're too expensive to go do something
5 like that for you. So they do it themselves.

6 So what an individual customer actually does
7 has to be known to know whether or not a system
8 infringes when the claim calls out a system that has
9 multiple catalogs, for example. And so that's a
10 complexity of this case, but it's an indirect
11 infringement case, in essence, there. I know they
12 dispute that, but at some level here, Your Honor,
13 that's relevant to the case.

14 So what exactly a given customer has, is that
15 something they populated? They're buying stuff.
16 That's what, I think, the vast majority of them do.
17 Are there some that do something else? I guess there
18 might be an issue of fact there.

19 At this point they have subpoenaed several of
20 our customers. They haven't really followed through
21 with any of the depositions of any of them to establish
22 that a single one of them even has a catalog under
23 their definition on their systems.

24 But, you know, odds are they are going to
25 have an Item Master like we have sold for 30 or 40

1 years, and they don't have confidence, I don't think,
2 that they were going to be able to necessarily show
3 that they are also getting these wholesale catalogs
4 imported in. So they have to keep this as a plan B to
5 make sure that the catalog is defined broadly enough
6 that even if it's the normal customer just listing
7 stuff they buy, they can still have a gotcha.

8 That could be an issue going down the line
9 because of the indirect/direct infringement,
10 inducement, and things like that. I at least wanted to
11 give you that context here.

12 THE COURT: You know what the problem is with
13 lawyers sometimes? It's a problem with very smart
14 lawyers according to Judge Williams, my colleague.
15 Sometimes they outthink owls. And when they do, they
16 create a lot of issues that don't need to be litigated.
17 And I think both of you are outthinking owls right now.

18 All right. Let's go. I understand.

19 MR. McDONALD: All right. Thank you, Your
20 Honor.

21 THE COURT: That was meant as a compliment.

22 MR. McDONALD: Oh, thank you.

23 THE COURT: To your ability to think.

24 MR. McDONALD: Which now casts doubt on
25 whether we are really as smart as you just thought we

1 an order list? Well, it's a list of stuff you order.

2 Well, not so fast. Actually, the patent
3 makes it pretty clear that that's not what it is
4 because there are further steps to go before you
5 actually place an order and what's on your order list
6 may well not be the same thing you wind up ordering.

7 So it's really an intermediate list that is
8 transferred from the search system, the TV2 search
9 program system, transferred to the requisition system.
10 It's kind of an interim order list of things they may
11 want to order. But then it goes over there to the
12 requisition system, and you've got your selected items
13 there. And from there you can build your requisition
14 using that. You don't have to use everything on the
15 order list. You can add to it. You can subtract to
16 it. Maybe from some other searches you did. Maybe
17 because you just know a catalog number for a product
18 you may frequently order and don't need a search.

19 So there are some very specific meanings is
20 my main point here as to what an order list is, what a
21 hit list is, and just giving those things a plain and
22 ordinary meaning is inappropriate in view of what's
23 described here and really invites mischief.

24 It also highlights what a selected matching
25 item is. Matching is the search part that gets you to

1 items are. They comprise the order list, not the
2 requisition.

3 Then the next element is the means for
4 building a requisition that uses data obtained from the
5 database relating to selected matching items on said
6 order list. So that claim 1 of the '172 does have
7 claimed in there that same sequence I was just
8 describing where you match them, you select them for
9 the order list, and then you go to the requisition, and
10 only then.

11 Do you have any other questions about that
12 one, Your Honor, or may I go on to the cross-reference
13 table?

14 THE COURT: All right.

15 MR. McDONALD: Thank you.

16 So we've got ePlus said this one doesn't need
17 to be construed. We've got our proposed construction
18 because, again, a cross-reference table is not
19 necessarily really something that has a plain and
20 ordinary meaning, and the concern is certainly that if
21 you don't have a definition of that, is the jury really
22 when they get back in that deliberation room, are they
23 really resolving an issue of fact? Or are they going
24 to be agreeing on what, for example, the Lawson product
25 is? Or are in agreement on the facts of what the prior

1 wasn't it?

2 MR. ROBERTSON: June 14.

3 THE COURT: And when I set that trial, I will
4 tell you what it is. It's a date that I have to be in
5 Oregon. I didn't realize that I had to be in Oregon,
6 and I've been trying to work out a way to tell you
7 exactly what the trial was before I did the order. But
8 I'll sign the order and you all can have it. You've
9 been abiding by it anyway, haven't you?

10 MR. CARR: Yes, sir.

11 THE COURT: All right. Okay. Does that take
12 care of what we're going to do today?

13 MR. McDONALD: Yes, sir.

14 THE COURT: Thank you all very much. We'll
15 see you on the 27th.

16 We'll be in adjournment.

17

18 (The proceedings were adjourned at 5:20 p.m.)

19

20 I, Diane J. Daffron, certify that the
21 foregoing is a true and accurate transcription of my
22 stenographic notes.

23

/s/

1/26/10

24

DIANE J. DAFFRON, RPR, CCR

DATE

25